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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOWARD WEBBER,

Defendant.

Case No.: CR 13–662 RS

DEFENDANT'S SENTENCING MEMORANDUM

Court: Courtroom 3, 17th Floor

Hearing Date: May 23, 2017

Hearing Time: 2:30 p.m.

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INTRODUCTION

Defendant Howard Webber stands before the Court convicted by jury trial of several counts of wire fraud, conspiracy, and aggravated identity theft. Unlike the typical fraud case prosecuted in this District, however, the actions of Mr. Bercovich and Mr. Webber were not undertaken to cheat the vulnerable victim out of retirement savings or lure investors into a hopeless Ponzi scheme. Instead (assuming this Court believes Mr. Bercovich, as the government does), the majority of the money lost by the IRS in this case was spread around to the various taxpayers Mr. Webber and Bercovich solicited. While their actions were certainly fraudulent and motivated by financial gain off the government, the two were not out to hurt other people nor callously cause financial ruin. Indeed, the government's sentencing memorandum admits as much. The government neither contends that identifying information was stolen, nor that the operation withheld the majority of the refund payment from the taxpayers. Moreover, to the extent taxpayers did not get paid, only Bercovich could be responsible as he alone controlled the deposits, withdrawals, and distributions from the accounts. Such inaction would not be the fault of Mr. Webber.

Fraudulent conduct? Yes. Malicious or callous conduct? No. Certainly, the fraud against the government must be punished. But this is a different type of fraud case and most definitely a different type of "aggravated identity theft" case than ordinarily charged. The Court can and should consider these factors when deciding upon the appropriate sentence in this case for Mr. Webber.

It is also critically important that this Court consider the actual gain here to Mr. Webber. At trial in this matter, both the government and the defense independently arrived at a "gain" figure for Mr. Webber of between $43,000 and $44,000 from this fraud. *See* Second Declaration of Elizabeth Falk ("Falk Decl") at Exhibit A (Government Trial Exhibit 343 indicating a gain of $43,761); *see also* Exhibit B (Defense Trial Exhibit indicating a gain to Howard Webber of $44,703.64.) All told, the proportion of the $610,089.69 in tax refunds deposited into IARLS' accounts that ultimately went to Mr. Webber is small – less than 10% of the government's loss. *See id.* at Exhibit C (Defense Trial Exhibit with monthly breakdown of refunds deposited into IARLS accounts by Bercovich versus payments to Howard Webber and known associates.) Nearly $10,000 of this money went to child support for Mayra Parl. *See id*. at Exhibit A. It is further undisputed that Mr. Webber had neither control nor access to the proceeds of the fraud in this case, except through co-defendant Bercovich. As far as where the actual hundreds of thousands of IRS dollars actually went, the only defendant who knows is co-defendant Bercovich.[1] At trial, the government contended that Bercovich was telling the truth when he testified that the majority of the money, by and large, went to the taxpayers who gave recruiters their identifying information. The government should not, and does not change its position now.

The Court should also strongly consider sentences that have previously been imposed in this district for conduct extremely similar to that of Mr. Webber – conduct that has nowhere near warranted the astronomical sentences called for by both the Probation Officer and the government in this case. Indeed, these requested sentences – 134 months and 147 months, respectively, have only been doled out in this District to the most heinous of fraud criminal responsible for causing millions and millions of dollars of loss to actual people – not the federal government. While tax fraud cases are certainly serious and warrant a period of incarceration, the recommendations of the government and the Probation Officer in this case are so far off the mark of justice and fairness that this Court should treat these recommendations accordingly.

In 14 years of practice, the undersigned has never felt so strongly about the unreasonableness of two recommended sentences when compared against similarly situated cases prosecuted in this district- even after trial. *Not even Luke Brugnara*, a multiple time obstructionist fraud felon and federal court tax evader to the tune of $1,904,625.35 in tax evasion loss received a *cumulative* sentence of 134 months in this district – despite a three week jury trial on his second federal art fraud case that also involved an escape from U.S.

[1] Given the fact that Mr. Webber is in custody from July 20, 2011 through the search of Mr. Bercovich's residence in January, 2012, the lack of control Mr. Webber had over the funds in this case for the majority of the time period the refunds hit the IARLS accounts is self-evident.

Marshal custody, a three day manhunt in the middle of the case, and a contempt charge.[2] At minimum, the 134 and 147 month sentences recommended by the government and probation office are certainly not the sentences sufficient, but not greater than necessary, to fulfill the goals of 18 U.S.C. § 3553(a).

Instead, for all the reasons stated in this Memorandum, the Court should sentence Mr. Webber to time served. As set forth here, the BOP equivalent sentence already served by Mr. Webber (counting only the federal time) is 42.5 months. For all the reasons stated herein, the Court should sentence Mr. Webber to time served (including in the judgment that the Court understands this sentence as 42 months), three years of supervised release, and the requisite special assessment of $1500.

STATEMENT OF FACTS

This Court sat through a multiple day jury trial and listened to all the witnesses who testified, as well as the arguments of counsel. There is no need to re-recite the facts for the Court here, except to the extent Mr. Webber articulates his factual objections to the PSR. The main factual considerations Mr. Webber asks the Court to keep in mind when adjudicating this case under 18 U.S.C. § 3553(a) are 1) the small monetary gain Mr. Webber realized from the fraud here, which both sides independently documented as approximately $43,000 and $44,000; 2) the lack of evidence that any individual taxpayer was less than a willing participant in attempting to obtain a fraudulent tax refund through Mr. Bercovich and Mr. Webber; 3) the lack of evidence of stolen identities, which is the far more "aggravated" form of aggravated identity theft, and 4) the relative culpability and involvement of Mr. Bercovich in this scheme, who can be described as no less than a 50%-50% partner with Mr.

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[2] *See* Gov. Sentencing Memorandum in each case, *United States v. Brugnara*, CR-08-222 WHA, Docket 110, and CR-14-306 WHA, Docket (setting forth further detail on Mr. Brugnara's two federal cases, his escape from U.S. Marshal custody and subsequent *pro se* jury trial on art fraud. On his tax evasion case, Mr. Brugnara received 30 months for the aforementioned tax loss of $1,904,625.35. On his second federal fraud case five years later involving an art scam, escape from custody and and contempt, Mr. Brugnara received a sentence of 84 months in custody. *Even together*, these two sentences do not equal 134 months and certainly do not equal 151 months.

Webber, yet was not subject to many of the below-referenced enhancements that the PSR requests this Court to find apply to Mr. Webber.

OBJECTIONS TO THE PSR

I. FACTUAL OBJECTIONS

A. Objection One: Number of Tax Returns at Issue

This "900 tax return" number in the PSR appears to be generated only through Mr. Webber's conversations over the telephone with Mr. Bercovich, as opposed to the Probation Officer's actual review of any tax returns. To the extent "the case agent" claims 900 returns, Mr. Webber has never seen actual evidence of those number of returns. Even the government appears willing to concede that only 608 certified tax returns were produced to Mr. Webber in discovery, and beyond that, only 694 copies of actual returns were produced to Mr. Webber in discovery for his review that bear the so-called "hallmarks" of the fraud that is within the scope of the conspiracy. Mr. Webber can only verify numbers of tax returns he has actually seen – he is not trying to argue for argument's sake, but he is entitled to review underlying documentation of summary figures underlying charts that document loss and thus far, underlying documentation has not been produced to Mr. Webber that supports the 900 tax return figure. Given the government's Sentencing Memorandum that appears to abandon the $806,000 loss figure, the Court should sustain Mr. Webber's first PSR objection.

B. Objection Two: Resolved By the Court's Rule 29 and Rule 33 Order

Because the Court has already resolved Mr. Webber's objection to the conclusions in the PSR by means of written order to Mr. Webber's Rule 29 motion, Mr. Webber withdraws the second half of this objection but asks that the Court order that his objection to this Court's conclusion be noted in a revised PSR. He thus requests that the Court order the Probation Officer to add to the PSR something to the effect of "According to Mr. Webber, the evidence at trial established the testifying inmates' own handwriting on the envelopes mailed to Mr. Bercovich that contained a postmark on or near the date of the referral form, as well as their own handwriting on the referral forms setting forth the identifying information. Moreover, Mr. Webber contends that the inmates at issue on the counts of conviction for aggravated identity theft all conceded at trial that the identifying information on the referral forms was written in their own handwriting, and also that in each case, he mailed the form to Bercovich on his own. Mr. Webber denies writing down, physically possessing, or mailing any identifying information in connection with Counts 24-28 and maintains that the trial record supports these contentions."

II. OFFENSE LEVEL OBJECTIONS:

With respect to the offense level, Mr. Webber objects to the conclusion of the Probation Officer that the base offense level in this case is 26 for the grouped fraud offenses. Instead, he contends that the base offense level for the grouped fraud offenses should be no more than 16, as described below.

A. Objection Three: Loss Amount Should Be Base Offense Level 18, Not 20

First, the PSR contends that the loss amount in this case should be $806,580. *See* PSR at ¶ 20. As Mr. Webber understands it, this figure was arrived at by means of a spreadsheet created by the case agent and provided in discovery to Mr. Webber without much of the back-up documentation (namely, the underlying tax returns). Mr. Webber thus stands by his objection that the $806,580 spreadsheet is unsubstantiated and appears to contain duplicate entries and erroneous entries.

From Mr. Webber's first-cut review of the Government's Sentencing Memorandum, it appears that the government is not intending to prove up the $806,580 figure. Although Mr. Webber will respond to the Government's Sentencing Memorandum in more detail at a later date, it appears at this juncture that the government claims two basis for an intended tax loss calculation. First, the government argues that the actual refunds deposited into the Box 603 IARLS accounts should constitute the loss (which the government calculates as $610,089.69). In the alternative, the government argues that the loss should be the claimed tax refund amounts accounted for in the actual tax returns provided to Mr. Webber in discovery (as opposed to in mere spreadsheet form) which the government contends amounts to $551,229. See Gov. Memo at 7-8. This later argument only makes the "cut" for Base

Offense Level 20 by $1,230. See U.S.S.G. § 2T4.1 (Base Offense Level of 20 between $550,000 and $1,500,000 in tax loss, while Base Offense Level 18 is between $250,000 and $550,000 in tax loss.) Because the government has not, and cannot prove that either figure should apply to Mr. Webber as relevant conduct, nor that the relevant tax loss in this case exceeds $550,000, this Court should instead find a Base Offense Level of 18 – intended loss between $250,000 and $550,000.

i. Mr. Webber Cannot Be Held Accountable for All $610,089.69 in Fraudulent Refunds Deposited to Box 603 Because More than $60,089.69 of These Deposits Are Outside of Scope of the "$7,000/Golden Number" Scheme And Had to Do with A Separate Conspiracy on Bercovich' Part

The first basis for the government's relevant conduct argument addresses the actual deposits made into the Box 603 account from the IRS. *See* Second Falk Declaration Re: Loss (Docket 370) at Exhibit F, Spreadsheet of All Tax Refunds Deposited into IARLS Accounts between 12/17/2010 and 1/31/2012. There are two problems with this analysis. First, the government has not even come close to proving that all these refunds claimed fraudulent wages and thus, stemmed from fraudulently filed tax returns. Second, many of the deposited refunds were not in the amounts of $738, $857, or some iteration of those number less IRS child support deductions or back tax payments (as is the case with the $400 or $300 refunds noted) that is the "hallmark" of Mr. Webber's fraud. Instead, well over $100,000 of these deposits – $126,109.07 to be exact – are deposits that range from $1,143 to $4,400 each that have absolutely nothing to do with either Mr. Webber nor the alleged "golden number" scheme whereby the taxpayer simply claims $7000 in wages. Indeed, the very basis upon which the government claims that this Court can presume a given return in this case is fraudulent is due to the fact that the wages claimed (and refund requested) all approximate $7000 and all claim identical refunds of $738 or $857. A large number of deposits into the Box 603 account do not meet these characteristics nor is there any proof now before the Court that these returns claimed fraudulent income (or that the corresponding refunds were fraudulent, fraudulently run through the Box 603 account without the taxpayer's permission.) *See id*. at Exhibit F. These deposits are clearly outside the scope of what Mr. Webber was convicted of because they do not match the pattern the government was so reliant upon at trial to prove both the conspiracy and the fraudulent nature of the returns in general. Moreover, the government boldly contends that these returns are "all fraudulent" without one iota of proof that the returns at issue actually claimed fraudulent wages earned and requested fraudulent deductions. Mr. Webber would be entirely remiss to fail to object to the inclusion of these deposits, given that 1) he has never even seen nor been provided with the tax returns that led to these deposits, and 2) the refunds associated with these deposits do not at all match the pattern of the scheme that the government has convicted him of at trial.

Nor can these deposits fairly be attributed to Mr. Webber as "relevant conduct." *See* U.S.S.G. § 1B1.3(a)(1)(B). While relevant conduct is broad, it is not boundless – in the case of jointly undertaken criminal activity, the acts and omission of other participants may only be included as relevant conduct against another defendant when those actions are 1) within the scope of the jointly undertaken criminal activity; 2) in furtherance of that activity, and 3) reasonably foreseeable in connection with that criminal activity. Here, it is important to note that the IRS first located Bercovich – not Mr. Webber – in connection with an entirely different conspiracy Bercovich was running teaching people unbeknownst to Mr. Webber how to file fraudulent tax returns. Mr. Bercovich led the IRS to Mr. Webber – not the other way around – and the scope of Bercovich's conduct in this case is far broader than Mr. Webber's in terms of the number of individuals contacted to file tax returns, as well as the scope of those tax returns. At trial, Bercovich testified that he did not believe ever refund that came into the Box 603 account was grounded in fraud, nor could he attest that a refund was fraudulent unless it bore the "hallmark" of the "golden number" figure, or listed wages in even numbers than approximated $7000. Given the fact that a substantial portion of the $610,089.69 figure derives from refunds that are well outside the scope of the "$7000 scheme," it cannot be argued that these refunds were either "reasonably foreseeable" to Mr. Webber nor that the returns that produced these deposits necessarily claim fraudulent wage and income information. Mr. Webber thus objects to the use of the $610,089.69 figure as relevant conduct loss and submits that if the Court opts to use this method, the loss amount should be no more than $483,980.62. This figure may be reduced even more, subject to Mr. Webber's additional contentions below that some taxpayers for whom refunds were received both 1) were entitled to those refunds, and 2) were paid a substantial portion of those refunds. However, for Guideline purposes, Mr. Webber agrees that given the existing caselaw the government could prove by a preponderance that the intended tax loss in this case exceeded $250,000 by means of reasonably foreseeable relevant conduct.

ii. The Government's Alternative Claimed Loss Figure of $551,229 That Derives From Claimed Refund Amounts On Tax Returns Produced in Discovery Should Be Rejected as Supporting Offense Level 20.

As an alternative theory, the government proposes that the Court should use the total amount of claimed refunds associated with the Box 603 account that 1) claimed wages in the approximate amount of $7000, and 2) were produced to Mr. Webber in discovery, so he could actually verify the underlying data on the returns. Per the government, the total amount of the refunds claimed in these returns is $551,229 – only $1,230 away from the lower Base Offense Level of 18. Mr. Webber understands that, under *United States v. Stargell*, 738 F.3d 1018 (9th Cir. 2013), the district court may use, as intended loss, the amount of tax refunds claimed on purely fraudulent tax returns. However, this case is very different than *Stargell*. As reported by the Ninth Circuit, defendant Stargell offered "no evidence" that any of the filed-for taxpayers were entitled to the refunds claimed. Moreover, in that case, the Ninth Circuit made it clear that there was "no evidence" in the record to support Stargell's contentions that she intended to pay the taxpayers at issue their fair share of the refunds:

> Stargell failed to provide any substantial evidence to support her contention that she gave, or intended to give, the involved taxpayers the refunds to which they were entitled. The district court's conclusion that Stargell intended to keep the total amount of refunds claimed in the fraudulent returns was reasonable based on the evidence in the record. Likewise, using that amount as the "total tax loss" was also reasonable. At sentencing, the onus was on Stargell to establish a lower tax-loss amount based on the allegedly entitled refunds and to evidentially support such amount; yet, she did not. *See* Bishop, 291 F.3d at 1116. Even at the appellate level, Stargell has neither pointed to any evidence establishing that the involved taxpayers were entitled to a refund nor provided an entitled-refund amount by which the tax-loss figure should be decreased.

Here, however, Mr. Webber *does have* proof that certain of the taxpayers for whom Bercovich or Parl claimed refunds for within the group of $551,229 were owed the refunds that were claimed on their behalf, and also, that Bercovich paid those individuals at least some of the refund due. This evidence derives from the SEP and IRP data submitted to Mr. Webber and the Court in summary form at trial. *See* Second Falk Declaration, Exhibits D and E. In this data, the government ran actual reported income for a number of the taxpayers identified in Government Trial Exhibits 348-956 (the tax returns submitted in support of the government's loss figure of $551,229) as well as the additional returns produced by the government in discovery. *See* Gov. Sent. Memo, Exhibits A and B. According to the government's own data, the SEP and IEP reports show that out of 161 of the 684 returns (the only returns the government ran through the IEP system), the named taxpayers were cumulatively entitled to at least $12,258 of the $128,706 in refunds claimed. Coupling this data with Bercovich's own trial testimony that he paid each and every taxpayer for whom he claimed a return (and drove around with large wads of cash to do so), Mr. Webber has surpassed the *Stargell* threshold to reduce the claimed loss amount by the requisite $1,230 that would allow the offense level to be reduced to 18. Even deducting the "cut" that Bercovich testified he took for his trouble of processing the returns – no more than $250 per return according to him – there is sufficient evidence in the trial record to establish, by a preponderance of the evidence, that at least $1,230 of the $12,258 the IRS owed these 161 taxpayers made it to actual taxpayers. For example, at trial, Patrick Breuning testified that he successfully received $600 from Bercovich while in custody that went undetected by prison officials – at least a portion of the $929 the SEP data shows he was owed by the IRS for actual, real work. This $600 alone that Mr. Bruening received from Bercovich is nearly half of the amount Mr. Webber must prove to get the Base Offense Level down here to Offense Level 18 ($1230).

All told, the government has not adequately shown the Court that the Base Offense Level for this offense should start at 20, rather than 18. Given the proximity of the government's claimed loss figures to Base Offense Level 18, this Court should err on the side of caution and rule in Mr. Webber's favor on this point. While Mr. Webber may "bear the onus" of proving that taxpayers for whom Bercovich claimed a refund were legitimately entitled to a refund under *Stargell*, the government still bears the overall burden of proving Sentencing Guidelines enhancement, including loss. Both the SEP data, as well as cooperating witness Bercovich and Breuning's testimony, are the evidence of recouped loss that was missing from the *Stargell* case.

In addition to these arguments, it is worth noting that the loss amount in Bercovich's plea agreement is limited to $497,811 with a Base Offense Level of 18. The government offers absolutely no justification why the tax loss attributed to Bercovich would be any less than that attributed to Mr. Webber, given their respective roles in the conspiracy and the fact that Bercovich was the only participant who controlled the $616,000 in refunds that were deposited into the IARLS accounts. Moreover, at trial Bercovich testified he was the one who filed the majority of the tax returns in this case, handled all the accounting, determined what each taxpayer was to be paid, and actually paid the taxpayer. Pursuant to Mark Bode's trial testimony, the only individual he dealt with was Bercovich; he had never even met Mr. Webber. The promotion of two different tax losses by the government for these two defendants is unsupported by the evidence adduced at trial and presented to date to this Court. It is also grossly unfair from a 18 U.S.C. § 3553(a) perspective.

B. Objection No. 4: Acceptance of Responsibility

Attached to this Memorandum is Mr. Webber's statement of acceptance of responsibility. See Exhibit A. The statement takes full responsibility for the fraud at issue in this case, as well as the conspiracy. The statement also explains the difficulty Mr. Webber had understanding the boundaries of aggravated identity theft. It is well within this Court's discretion to credit Mr. Webber's post-trial statement of acceptance of responsibility after trial, even when contesting intent to defraud at trial. *See* United States v. Cortes, 299 F.3d 1030 (9^{th} Cir. 2002)(remanding case for consideration of credit for acceptance of responsibility despite having proceeded to trial to contest intent). The Adjusted Offense Level should be reduced an additional two levels for post-trial acceptance.

C. Objection No. 5: Tax Preparer + 2 Enhancement Should Be Stricken

Mr. Webber did not prepare a single tax return in this case. Despite diligent search, Mr. Webber has been unable to find a case where this enhancement was applied to someone who did not actually prepare any tax returns, own a tax-return preparation business, or actually run a business that promotes fraudulent tax shelters or something similar. Indeed, the Probation Officer's response to this Objection appears to concede that tax return preparation point, but instead refers to the Commentary of U.S.S.G. §2T1.4(b)(2), which reads "the first prong applies to persons who derive a substantial portion of their income through the promotion of tax schemes, e.g. through promoting fraudulent tax shelters." This enhancement contemplates an actual business in operation whereby one is touting or exploiting a special skill or expertise in tax law or holding out a business in order to induce people to participate. This is not such a case when it comes to Mr. Webber and there is a dearth of caselaw to support this enhancement being applied to a defendant in his position, who did not file any tax returns in this case. This is not a "tax shelter" scheme nor an individual who held promotional meetings advocating the use of trusts or other tax instruments to avoid paying taxes. The Court should thus strike this 2 level enhancement.

D. Objection No. 6: Organizer/Manager Enhancement of +4 Should Be Stricken

Mr. Webber objects to the imposition of a 4 level enhancement for being an organizer/leader of criminal activity involving 5 or more participants. In addition to the lengthy objection he articulates in the PSR, he adds argument here about why the imposition of a 4 level enhancement is inappropriate. The enhancement appears to be grounded in two different theories; first, Mr. Webber's role recruiting inmates to solicit other inmates to participate in the program in exchange for referral fees; and second, that the operation was "otherwise extensive." Mr. Webber addresses each argument below, in turn.

i. Organizer/Leader

With respect to the "organizer/leader" prong of the enhancement, Application Note 4 to U.S.S.G. §3B1.1 indicate that the factors this Court should take into account when contemplating an organizer/manager enhancement are the exercise of decision-making authority, the nature of the defendant's participation in the offense, and the share in the fruits of the crime. *See id.; see also United States v. Mares-Molina*, 913 F.2d 770, 773 (9th Cir. 1990). More than one person can qualify as an organizer/leader. *See United States v. Barnes*, 993 F.2d 680 (9th Cir. 1993). Simply recruiting other people to participate in criminal activity is one consideration, but not if the Court finds those individuals to be unwitting participants – the defendant must be found to be managing criminally culpable individuals. The fact that a person plays an important or essential role in a criminal enterprise does not necessarily require an aggravating role adjustment. *See United States v. Woods*, 335 F.3d 993 (9th Cir. 2003)(reversing imposition of enhancement because the government failed to prove the defendant actually "supervised" or "managed" any of the criminally responsible participants.)

Here, the idea that Mr. Webber somehow "managed" Bercovich is not in line with the actual evidence in the case. Both Shawn Cowgill and Mark Bode testified that Bercovich taught them how to recruit and fill out the referral forms at issue; Shawn Cowgill further informed the Court that Bercovich taught him how to conduct the scheme, prompting him to branch out on his own to conduct it with others. Bercovich alone controlled the money and decided where the proceeds would go. Bercovich alone, or in concert with Mayra Parl, filed all the returns. Bercovich alone decided to change the income figures reported on numerous referral forms from the $7000 listed on the inmates' referral forms who testified at trial to various iterations of $6000ish figures, in order to avoid looking suspicious to the IRS; he did so without consulting Mr. Webber and clearly did not feel he needed to consult with Mr. Webber to do so. Finally, Bercovich alone signed inmates' names to tax returns and decided the timetable under which he would provide them their portion of the refunds, in what amounts.

To the extent the government relies on the telephone calls between Mr. Webber and Mr. Bercovich to attempt to establish this enhancement, the government is mistaken. The fact that Mr. Webber asks Mr. Bercovich to send him money, advance inmates' money, or pay inmates for returns that were filed in their names, Mr. Webber was only reiterating responsibilities that Bercovich himself had agreed to carry out. At trial, the numerous spreadsheets of bank account activity introduced at trial shows that Mr. Bercovich was spending IARLS money from the tax refunds on many personal items and expenditures, such as meals out, groceries, home good, and the like. Given the dearth of alternate sources of income to those accounts, it is a fair conclusion that Bercovich's payments for his household cable, groceries and restaurant meals came from the IRS tax refunds deposited into the accounts. All told, he received, at minimum, just as much money from this fraud as Mr. Webber based solely on the bank records that establish his spending. The bank records do not even account for the large number of cash withdrawals Mr. Bercovich made from these accounts, and the Court will never fully know how much of that cash Mr. Bercovich pocketed, as opposed to providing to the individuals for whom he filed tax returns.

In sum, there is nothing about this case that suggests Mr. Webber "managed" or "supervised" Bercovich in conducting this fraud. To the extent the Probation Officer found otherwise, she was not present at trial and could not have possibly understood the full extent of Bercovich's testimony without reviewing a trial transcript.

Nor was any evidence adduced at trial that Mr. Webber in any way supervised Mayra Parl in the course of her preparation of tax returns. Indeed, for the majority of this fraud Mr. Webber was stuck in Wisconsin State Prison with no access to Mayra or her tax preparation software. The phone calls introduced at trial do not show any direction or supervision conducted by Mr. Webber towards Mayra Parl. All Ms. Parl's notes introduced at trial were directed towards Mr. Bercovich, and the evidence adduced at trial suggests that Ms. Parl went to Mr. Bercovich, as opposed to Mr. Webber to have her questions answered about what to do in connection with the tax returns.

As for the inmates recruited by Mr. Webber at Santa Clara County Jail and MSDF in Wisconsin, the evidence at trial also suggests that Mr. Webber did not manage or coordinate the inmate recruiters after telling them about the tax refund plan and providing the inmates with referral forms; these inmates called and dealt with Mr. Bercovich directly. While these inmates may have played chess with Mr. Webber in the dayroom or sat around talking about this fraudulent IRS credit, the recruiting activities at issue were handled by each individual recruiter himself after hearing from Mr. Webber what the scheme was about. Each recruiter independently called Bercovich to request payment and moreover, each recruiter communicated directly in writing with Bercovich himself. By writing his name on the referral form as the recruiter, each recruiter staked his own claim to the commission payment. It is simply not the case that Mr. Webber exerted any "control" or supervision over these invididuals.

Moreover, in order for the inmates to qualify Mr. Webber for the organizer/leader enhancement, the government must prove up that the inmates recruiters are "criminally culpable" participants and that overall, there are at least five such "criminally culpable" participants. *See, e.g., United States v. Luca*, 183 F.3d 1018, 1024 (9th Cir. 1999); *United States v. Jordan*, 291 F.3d 1091 (9th Cir. 2002). Here, the government has essentially argued throughout this case that the inmates who got involved with Mr. Webber were unwitting participants in this fraud, or even worse, victims. The government inmates do not rise to the level of "criminally culpable" participants necessary to count for the upward enhancement for organizer/leader.

ii. "Otherwise Extensive"

In *Luca*, 183 F.3d at 1024, the Ninth Circuit held that the enhancement under U.S.S.G. § 3B1.1, Aggravating Role, cannot be applied under the "otherwise extensive" prong unless the evidence shows that the defendant at issue "clearly identifies a participant over whom the defendant exercised managerial or organizational control." *See id*. This limitation on the application of the enhancement makes sense; otherwise, every single large scale Ponzi scheme with enormous loss would be considered "otherwise extensive" criminal activity and would essentially tag a 4 level enhancement onto any case where the government was able to demonstrate a large volume of loss. This is precisely what the government tries to do here. The Court should not allow the government to succeed in obtaining this extra enhancement, because as explained above, Mr. Webber did not exert "managerial or organization control" over anyone in this case. First of all, *he was in jail during the majority of the offense and* *during the entire period of time of the actual fraud and aggravated identity theft charges.* Second of all, it is undisputed that Mr. Webber had no direct access to the money in this offense. Third, the government declined to apply the organizer/leader enhancement to Mr. Bercovich pursuant to its plea agreement, who is the defendant who exerted organizational control over the actual money at issue in this case and was the initial target of these investigations. It makes absolutely no sense for this Court to apply a +4 enhancement to Mr. Webber by finding he managed or controlled a criminally responsible participant in this case when Mr. Webber is 1) in custody over the majority of the offense, and 2) had absolutely no control over the distribution of the proceeds of the fraud and no control over the IARLS bank accounts at issue. The fact that Mr. Webber asked Bercovich, his 50% partner, to send him or his attorney money and Bercovich did so does not make Mr. Webber a manager over Bercovich.

Moreover, in *United States v. Rose*, the Ninth Circuit explained how a district court determines that criminal conduct is "otherwise extensive" by three factors; the number of knowing participants and unwitting outsiders; 2) the number of victims, and 3) the amount of money fraudulently obtained or laundered. *See id.*, 20 F.3d 367, (9th Cir. 1994)(citing *United States v. Stouffer* 986 F.2d 916 (5th Cir. 1993)(finding investment scheme involving 2,000 investors and $11 million in fraud loss "otherwise extensive.") Here, although the tax returns filed totaled 684 and thus arguably involved a significant number of "knowing participants," the lack of victims in this case, coupled with the loss at issue well under $1 million does not justify a harsh, 4 level enhancement. Here, there are minimal identifiable individuals who even claim to be victims of this offense[3], and the loss amount is not even over $1 million.

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[3] In this case, the Court only received two victim impact statements. One of these statements is from the mother of a deceased inmate who does not have any information about whether or not her son, Tycer Lee, participated in the scheme willingly to attempt to get free money from the government. The second victim impact statement, received by Mr. Coleman (who testified in this case) involves the fact that Bercovich mis-translated his social security number to the tax return he prepared and thus, Mr. Coleman has had difficulty with the IRS since. It is not Mr. Webber's fault that Mr. Bercovich mis-transcribed Mr. Coleman's social security number, however; it appears that this was an unintentional error on Mr. Bercovich's part in interpreteing the handwriting that Mr. Coleman used to write down his own social security number on the referral form he mailed to Bercovich hoping to get "free money" from the government.

Because the “otherwise extensive” enhancement is so severe, if should be reserved for truly widespread fraud cases involving multiple million dollars in loss. According to the government (and co-defendant Bercovich) neither conspirator here pocketed a significant amount of money. In the case of Mr. Webber, the actual profit shown at trial was only between $43,000 and $44,000. This, when coupled with the lack of Mr. Webber exerting organizational or managerial control over any participant, must lead this Court to reject the application of this enhancement in its entirety.

E. Summary

By subtracting two levels for Acceptance of Responsibility (-2) then subtracting the enhancements added by the Probation Department for Loss Amount at Base Offense 20 rather than 18 (-2), tax preparer (-2) and aggravating role (-4), this Court arrives at Mr. Webber’s requested Base Offense Level of 16.

III. CRIMINAL HISTORY BASED OBJECTIONS TO THE PSR

A. Objections 7, 9 and 12 Should Be Sustained Because the Government Does not Appear to Object to Their Removal and Offers No Records to the Court in Support of The Existence of These Convictions

Because neither the government nor the Probation Department has offered sufficient proof of these criminal convictions nor arrests, the Court should order Paragraphs 39, 42 and 65 should be struck by the Court

B. Mr. Webber Withdraws Objections 8, 10 and 11

Based on subsequent review of documentation, Mr. Webber withdraws his objections 8, 10 and 11 regarding Paragraphs 40, 46, 47, 54, and 56 of the PSR. Although he withdraws these objections, he instead makes a request for a departure from the Court based upon Overstatement of Criminal History.

C. Because Criminal History Category V Overstates the Seriousness of Mr. Webber’s Criminal Past, this Court should Department Downward to Criminal History Category III.

U.S.S.G. §4A1.3(b) authorizes this Court to issue a downward departure from the Guidelines when the criminal history category of a defendant substantially over-represents the seriousness of the defendant's criminal history or the likelihood that a defendant will commit future crimes. Here, Mr. Webber is 1 point over the line to be placed in Criminal History Category V based upon 1) a 1987 felony involving three hand-to-hand sales of cocaine in the amount of less than 10 grams each (see First Declaration of Elizabeth Falk, filed herewith, at Exhibit A), *see also* PSR at ¶ 43; 2) a 1 point 1996 misdemeanor "theft by contractor" case involving allegations that $3,834 and $3650.00 work was not performed satisfactorily and to completion; and 3) one misdemeanor and one felony domestic violence/threats/annoying phone calls from 2005 and 2006, respectively, which were consolidated for trial and each resulted in 6 month, time served sentences. *See* PSR at ¶ 49, 50. Although one of these convictions ultimately resulted in a 3 year prison term when Mr. Webber violated the terms of his probation, this is the only felony conviction Mr. Webber has suffered since 1987. It is extremely rare for a defendant with 1) a largely misdemeanor criminal history, and 2) an old criminal history (pre 2000) to be placed in criminal history category V. Here, 4 of the 11 points considered against Mr. Webber are from 1987 and 1996 cases, respectively, both of which are of a relatively minor nature. Although a warrant issued on those cases back in 1998 once Probation was revoked that brings the sentences served into the countable time frame, Mr. Webber made substantial efforts to clear the warrants between 2000 and 2011 that have been documented by the Wisconsin Parole Commission and a state court judge in Wisconsin. *See* First Falk Declaration at ¶¶ 14-19; *see also id.* at Exhibits A-F (conviction records and state court judge opinion documenting the shoddy paperwork practices and improper handling of the warrant on Mr. Webber's 1987 and 1996 cases). Moreover, given Mr. Webber's lack of positive drug tests during his period of federal pretrial release in 2015 and 2017, as well as utter lack of drug sales cases or arrests after 1987, there is no evidence in the record that Mr. Webber is likely to reoffend or be a recidivist drug seller in the future.

With respect to Mr. Webber's domestic violence convictions, it is also relevant for the Court to consider the fact that the victims of the second case, Ms. Parl and Ms. Zeigler, both wrote letters in support of Mr. Webber once he found himself in the position of being extradited to Wisconsin in 2011. *See* First Falk Decl., Exhibit G. Whatever the domestic issues were between Mr. Webber and Ms. Parl or Ms. Zeigler in 2005 and 2006, they appear to have cleared up by 2011 through today. Ms. Parl in particular no longer believes Mr. Webber is any kind of threat or danger to her, as she served the surety on Mr. Webber's bond in this federal case and allowed him to live with her and their daughter between April and September, 2015. There do not appear to be residual domestic violence issues nor any animosity between these parties at this juncture. These facts support a finding that Mr. Webber is unlikely to reoffend with any type of domestic violence behavior and certainly not towards the victims at issue in his more recent domestic violence conviction.

The departure is also warranted here because Mr. Webber's criminal history does not indicate a recurrent history of fraud, identity theft, stolen identities, or conduct similar to the instant case. His most recent fraud-type conviction is a 1996 misdemeanor involving a contractor dispute over an unfinished job. His plan for the future is to work in construction in a 9-5 capacity. For all the government makes of the Mount Madonna Inn issue, Mr. Webber was, in fact, working with Sterling Pacific Financial (a hard-money lender) to fix up, reconfigure, and find a buyer for the Inn, all with the consent and encouragement of Sterling Pacific. *See* Exhibit G. In late 2010 through 2011, it was this project – the Mount Madonna Inn project – that was taking up most of Mr. Webber's time – not the recruitment or monitoring of individuals who had recruited participants for the tax fraud scheme.

All told, Mr. Webber's CHC V status substantially over-represents his criminal history, given the following age and nature of that history:

- a 1987 felony conviction for selling small amounts of powder cocaine,
- a 1996 misdemeanor contractor theft involving $7000 worth of disputed work;
- a 2006 misdemeanor domestic violence case whereby the victim stood in support of Mr. Webber in 2011, and
- 2005 domestic violence case that was initially sentenced to probation with six months in custody, but ultimately resulted in a three year prison term.

Instead, the Court should depart downward along the Criminal History axis and find Mr. Webber more suitably situated in Criminal History Category III. Should the Court sustain all of Mr. Webber's objections and requested departures from the PSR, the resulting Guideline range for the fraud offenses is Offense Level 16, CHC III, for a starting range of 27-33 months.

ARGUMENT – VARIANCE

I. A VARIANCE FROM THE GUIDELINE RANGE IS WARRANTED TO ENSURE THAT MR. WEBBER IS NOT SENTENCED ANY MORE SEVERELY THAN SIMILARLY SITUATED DEFENDANTS IN THIS DISTRICT CONVICTED OF SIMILAR SCHEMES.

The 147 month sentence requested by the government in this case is grossly disproportionate to the types of sentences that have been imposed on similarly situated defendants in this district. In support of a variance downward to 18 months on the grouped conspiracy and fraud offenses under 18 U.S.C. § 3553(a)(6), which directs the Court to avoid unwarranted sentencing disparities, Mr. Webber points the Court to the following examples of in-district sentences for which the sentences imposed have been far, far less than the government's requested 147 months, even after trial or near-trial. It is also noteworthy that with respect to the below-referenced defendants, aggravated identity theft was never charged despite either the 1) similarity in conduct between these defendants and Mr. Webber, or 2) in some cases, the actual stealing of identities and complete conversion of the tax fraud proceeds, which did not occur in the instant case.

A. *United States v. Duffy R. Dashner and Mark Maness*, CR-12-646 SI

Pursuant to a review of the docket in the aforementioned case, defendants Dashner and Maness engaged in a sophisticated tax fraud scheme involving falsifying OID-1099 forms for clients, then requiring them to sign a power-of-attorney form that allowed them to endorse refund checks sent by the IRS. For their services submitting tax returns claiming refunds based on OID interest income, the two defendants charged 20% of the refund proceeds. *See* Docket at 1. Pursuant to the government's trial memorandum, the government describes defendant Dashner as "simply a con man who took advantage of people who trusted him by taking their money and helping them file false tax returns in their own names." *See* Exhibit B to this Memorandum, Dashner Trial Memorandum, at 5. All told, the defendants filed over 200 false tax returns claiming fraudulent refunds in the amount of $228,000,000 (that is $228 million) for which the IRS issued refunds in the amount of $1,769,418. *See* Exhibit C, Government Sentencing Memorandum, Docket 160, at 3; *see also* Exhibit D, Judgment in Dashner, Docket 172 (indicating a restitution order of $1,769,418). **This is triple the actual loss amount claimed by the government here**. "On the eve of trial," the government worked out a C plea deal with Dashner to 57 months imprisonment. *Id* at 2. The plea called for a Base Offense Level of 22, a sophisticated means enhancement of +2, a +2 level (rather than a 4 level) enhancement for organizer leader that did not contemplate the actual taxpayers as participants, and a 2 level adjustment for acceptance of responsibility. *Id.* Unlike Mr. Webber, Mr. Dashner was not charged with aggravated identity theft and did not need to plead to § 1028A, despite his virtual identical conduct to Bercovich transmitting false returns that contained his clients' social security numbers. Nor did the government request, or the Probation Office add, a two level enhancement for being in the business of preparing tax returns, despite the fact that Mr. Dashner clearly was operating an actual business that only prepared tax returns. At Criminal History Category II, the range of sentencing was 57-71 months. Mr. Dashner was accordingly sentenced t**o 57 months for $1,769,418 of actual tax loss (and $228 million of intended tax loss – triple the loss as the instant case).**

B. *United States. v. Josiah Larkin*, CR-15-10 SI

In September 2016, only months before Mr. Webber's trial, defendant Josiah Larkin went to trial on a virtually identical false tax return case that claimed fraudulent returns seeking the American Opportunity Tax Credit, which is "a refundable federal income tax credit . . for post-secondary education expenses such as tuition, fees, and course materials." *See* Indictment, Docket 1 at 2. As in the instant case, Mr. Larkin directed the refunds to his own company rather than the individual taxpayer, but Mr. Larkin charged a fee that was *half* of the actual refund claimed (in most cases, $500). *Id.* at 3-4. The filing of the returns in the *Larkin* case involved the use of similar means of identification, including names and social security numbers. However, unlike the instant case, no aggravated identity theft charges were ever filed against Mr. Larkin, nor did he decision to proceed to trial result in a superseding indictment that charged aggravated identity theft, despite virtually identical conduct as Mr. Bercovich. *Id.*

According to the government's sentencing memorandum, the fraud conviction against Mr. Larkin involved "280 fraudulent tax returns that falsely reported the maximum amount in qualified education expenses of $4,000." *See* Exhibit E, Larkin Memorandum (Docket 316). The actual tax loss at issue was $280,821.00. *Id*. According to the government, Larkin took half the clients' $1000 refund as a fee for his preparation, although the memorandum is silent about how much Mr. Larkin actually profited from his criminal offenses. From the government's perspective, however, Mr. Larkin was a particularly egregious defendant because he is a "highly educated" graduate of St. Ignatius High School and U.C. Berkeley who also had a previous federal fraud conviction for bank fraud. *Id.* at 9. Following this conviction, he also suffered a 2000 felony second-degree robbery conviction and a 2010 grand theft conviction. *Id*. at 10. At the time of the tax offense, he was also on active state probation. *Id.* Per the government, Mr. Larkin bordered on the "vulnerable victim" enhancement because he appeared to purposely open his tax preparation business in a poor area of San Francisco in order to lure "particularly susceptible" people to his scheme "who were unemployed, on government assistance, or earned no income." *Id*. at 8.

The government and the Probation Department urged a total offense Level of 24 and a CHC of II. In the Larkin case, the government recommended a sentence of 63 months. Judge Illston ultimately imposed a 37 month sentence, and it is unknown how she adjudicated the enhancements urged by the government. *See* Exhibit F, Judgment (Docket 321). While in that case, the government also urged the organizer/leader enhancement, trial evidence established at least three tax preparers who worked directly for Larkin and whom he specifically directed to file the false tax returns.

C. Other Defendants Sentenced to Far Less than the Probation Office and Government Recommended Sentences Here, For Similar Amounts of Tax Loss

In addition to Mr. Dashner, who very nearly went to trial, and Mr. Larkin, who also went to trial, there are a number of defendants who have been somewhat recently sentenced in this District for similar tax-related schemes – with a few important difference in comparison to the instant case. In many cases, the defendants at issue actually stole identities to put on the fraudulent tax returns. In other cases, the defendants at issue kept the entirety of the tax return, and made no effort to pay the owner of the identifying information that was used. These cases are discussed below, in turn:

- *United States v. Ayani Davis*, CR-10-687 CRB; Sentenced to 63 months for a tax loss of $496,900 in a similar Conspiracy to File False Claims prisoner tax scheme. *See* Judgment, Docket 90. What is clear from the government's sentencing memorandum, however, is that Ms. Davis actually stole identities of prisoners through her boyfriend to do so, who was an incarcerated inmate at the time. *See* Exhibit G, Gov. Sentencing Memo., Docket 82, at 2. It also appears from the government's memo, but is unknown, that Ms. David converted the entire refund obtained with each identity for her own use. Moreover, over the course of that case, the defendant "released the discovery in the case while she was detained in an apparent effort to smear others," thus violating the Court's protective order regarding discovery and nearly giving rise to an obstruction of justice enhancement. Moreover, despite having been arrested and "repeatedly lying to IRS agents," she continued to engage in the fraudulent scheme even after she was arrested by law enforcement. *Id.* at 4. This defendant was also positioned in CHC VI (apparent from the memo given the prosecution's requested "high end" sentence at Offense Level 19) and was referred to by the prosecution as "a career criminal." With the understanding and caveat that Ms. Davis' case was resolved by means of guilty plea, rather than trial, neither the requested sentence, nor the adjudicated sentence, was anywhere near 147 months. Nor was Ms. Davis apparently subjected to the tax preparation enhancement or otherwise charged with aggravated identity theft, despite her use of stolen identities to prepare tax returns.

- *Tonya Gilard*, CR-12-616-YGR; Sentenced to 37 months imprisonment on a guilty plea to Conspiracy to File False Tax Claims upon a guilty plea at CHC III and Offense Level 19 (no aggravated identity theft charge). According to the docket, Ms. Gilard filed false tax returns improperly claiming the first-time homebuyers credit, using 100 stolen identities according to the government. Per both the government and the Judgment order, the actual tax loss in this case (not intended loss) was $668,687. *See* Sent. Memo, Docket 67. It is unknown to Mr. Webber how the Court ultimately adjudicated the Guidelines.
- *Cherleszetta Brown*, CR-12-267-CRB; Sentenced to 41 months imprisonment on a guilty plea to Conspiracy to File False Tax Claims upon a guilty plea at CHC III and Offense Level 20 (no aggravated identity theft charge). *See* Docket 65, Judgment. According to the government, Ms. Brown filed false tax returns claiming false incomes and used numerous stolen identities to do so, as well as opened up straw bank accounts in taxpayers' names (according to the government.) Per both the government memo and the Judgment order, the intended tax loss in this case was $703,368.47. *See* Sent. Memo, Docket 60, at 5. Moreover, despite the fact that this defendant had used stolen identities in the past to commit a completely different crime, and was in possession of stolen credit cards and fake identifications during that prior crime, the government similarly did not charge Ms. Brown with aggravated identity theft in connection with her use of stolen identifying information to file tax returns.
- *Noemi Baez*, Cr-12-804 DLJ. This was the only terminated case Mr. Webber located involving a tax fraud scheme where the government actually charged aggravated identity theft and required the defendant to plead to aggravated identity theft to avoid trial. *See* Docket 50, Judgment. Because the government did not file a sentencing memorandum in this case, not much is known about the

facts other than the restitution order indicates the actual tax loss was $703,536.86 and the sentence imposed was a stipulated 30 month sentence; 6 months for the fraud conspiracy, and a consecutive 24 months for the § 1028A charge. *Id.* Though much is unknown about this defendant, it is relevant to the sentencing in this case that the government stipulated to a 6 month sentence for a tax fraud conspiracy with an *actual loss* amount of such magnitude ($703,536.86).

Wrapped up in this determination is the troubling ascent of the government's aggressive use of the aggravated identity theft statute – 18 U.S.C. § 1028A – in cases that do not involve actual stolen identities. While Mr. Webber now stands convicted of this crime under the Ninth Circuit's expansive definition of 18 U.S.C. § 1028A, this Court originally did not view this case as a typical case of aggravated identity theft. While the Ninth Circuit's interpretation of this statute is most certainly binding upon this Court, *Osuna Alvarez* and its progeny do not alter this Court's vast discretion to place Howard Webber's conduct in line with the dozens of other aggravated identity theft cases this Court has seen before. As this Court will recall, at least one juror in this case, as well as dozens of commentators, are troubled by the idea that an individual can be punished for "aggravated identity theft" by virtue of nothing more than filing or submitting any document in another person's name, *with that person's consent*, for a fraudulent purpose. The fact that the Ninth Circuit has declared this the law does not remove this Court's *nearly boundless* discretion to impose a sentence under 18 U.S.C. § 3553(a) that is in line with Mr. Webber's actual conduct in this case as to the fraud counts, which did not involve the use of stolen identities and thus, did not cause the type of devastating financial and economic harm to victims as the traditional aggravated identity theft case. While the statute does prohibit this Court from reducing the sentence on the underlying fraud *for the mere justification* that Mr. Webber also faces the mandatory minimum two year sentence on aggravated identity theft, nothing in 18 U.S.C. § 1028A prevents this Court from comparing Mr. Webber's overall conduct on the spectrum of fraud defendants who have committed similar crimes but under more aggravating circumstances.

II. A VARIANCE DOWNWARD TO 18 MONTHS ON THE FRAUD OFFENSES IS WARRANTED DUE TO MR. WEBBER'S OBVIOUS MENTAL HEALTH PROBLEMS

Because of the interlocutory appeal and other issues proceeding to trial, this case has been pending for a substantial amount of time before this Court and the Court has had the opportunity to observe and hear from Mr. Webber on a number of occasions. These occasions include trial (though Mr. Webber did not testify) as well as numerous *pro-se* filings (approximating 25 documents) where Mr. Webber has, for better or worse, opted to speak to the Court directly in writing. These documents, along with Mr. Webber's overall conduct in this case and the email correspondence evidence at trial , demonstrate the undeniable impact that Mr. Webber's undocumented mental ailments have had on him, and undoubtedly played out over the course of his conduct on this case. Though Mr. Webber is by no means incompetent or incapable of understanding the charges or his wrongdoing in this case, his mental health issues have impacted his judgment and conduct in his participation in this scheme, which was neither particularly sophisticated nor calculated. For example, unlike co-defendant Bercovich, who at least had the mindset to change the reported "$7000" wage figures from the handwritten referral forms to wage numbers on the tax returns that varied in the $6000-6800 range (in order to avoid detection,) per the trial testimony Mr. Webber never advised any inmate to do so and instead rather simply utilized the "golden number" figure of $7000 down the board, throughout his promulgation of this scheme. Mr. Webber's lack of foresight that, perhaps, the IRS would be less likely to detect this scheme were the wage numbers slightly different is but one example that he is not a saavy or sophisticated fraudster. Indeed, his emails to Bercovich were riddled with misspellings and often made no sense; they also demonstrated the tendencies of bi-polar behavior. The only rational conclusion from all the trial evidence is that Mr. Webber has mental health issues he has not yet addressed; hopefully during his supervision period he can start to come to terms with those issues and seek help to begin to address them.

A variance from the Guideline range is also warranted here because given the evidence adduced at trial, this fraud was not conducted by either Bercovich or Webber with any callousness or nefarious intent to dupe people or otherwise deprive people of hard earned dollars. Fraud against the government is still well worthy of punishment by means of incarceration, and Mr. Webber is not asking for a sentence of no incarceration on the grouped fraud offenses. He merely points out that the government's requested sentence on the fraud offenses alone -- 123 months – is the type of sentence ordinarily saved for a defendant in this District who commits repeated wrongs against unwitting investors, steals ruthlessly from others, or abuses a position of trust by promising fiduciary services that are never delivered or abused on a substantial scale. The entire tenor of this case is simply not in line with a double digit sentence for Mr. Webber, regardless of where this Court comes out on the applicable Guideline range. He fully recognizes that this is serious conduct that warrants a substantial sanction – but that an overall sentence of 42 months is much more in line with the crimes committed here.

III. A VARIANCE TO TIME SERVED IS JUSTIFIED BECAUSE MR. WEBBER HAS ALREADY SERVED A SUBSTANTIAL PERIOD OF OVERALL CUSTODY WHICH HAS HAD A SIGNIFICANT DETERRENT EFFECT ON HIS FUTURE BEHAVIOR, AS WELL AS A PERIOD OF ELECTRONIC MONITORING FOR 7 MONTHS WHICH THE BOP WILL NOT CREDIT TOWARD ANY FURTHER CUSTODIAL SENTENCE

Finally, this Court must remember that in requesting an overall, time-served sentence of 42 months, Mr. Webber has already completed a substantial period of custody in this case. *See* First Falk Declaration, ¶ 1-13. He is two days shy of 29 months of actual federal incarceration time. This does not count good time credits. Moreover, Mr. Webber will have completed 7 months of halfway house custody time as of the day of sentencing, with 5 months of that in lock down status. Lock down halfway house status is *more restrictive* custody than the pre-release halfway house time that the BOP provides inmates at the end of their federal sentences. With the 54 day per year statutory good time measure added to both of these custodial components, Mr. Webber had completed, at minimum, the equivalent of a 42.5 month sentence in this case already. *See id.* He also completed the majority of his federal incarceration at Glenn Dyer County Jail, which is the most onerous form of incarceration the federal system affords.

This 42.5 month calculation does not even count the additional time Mr. Webber spent in custody between July 20, 2011 and October 7, 2013 -- 27 months in Wisconsin state custody where Mr. Webber was repeatedly denied parole, partially a result of the conduct at issue here. *See* First Falk Declaration, Exhibit D. This 42.5 month also does not count the additional 7 months of pretrial release Mr. Webber spent on electronic monitoring. By the time of sentencing, Mr. Webber will have spent nearly six full years in a custodial setting, (July 11, 2011-May 23, 2017), either fully incarcerated in prison or at Glenn Dyer Jail, at a halfway house in either community confinement (2 months) or lockdown, or on electronic monitoring (either on lockdown or on a curfew.) This lengthy period of confinement has had a distinct impact on him, his mindset, and his view of his behavior. In this vein, even if this Court does not afford Mr. Webber any credit for acceptance of responsibility, the fact that he has accepted responsibility should impact this Court's view of the need to impose additional custody time to ensure a further deterrent effect on Mr. Webber.

All told, Mr. Webber has been adequately punished for his conduct in this case by means of incarceration. The undersigned respectfully submits that his most recent pattern of behavior over the last six months in the halfway house on lockdown release, which demonstrates complete compliance and rule-following, shows that he has learned his lesson and what will be expected of him in the future, both on supervised release and beyond. Both friends and family members have noticed this change in Mr. Webber. *See* Exhibit H, Letters of Support. This pattern of behavior is a distinct change from Mr. Webber's last period of pretrial release, and shows that the cumulative six years of custodial settings – 58 months combined of actual incarceration time between California and Wisconsin - have shifted his perspective about the need to follow the rule of law to the exact letter. There simply is no need to incarcerate Mr. Webber any further, given the fact that a 42 month time served disposition serves the necessary purpose of general deterrence given the loss amount in the case.

CONCLUSION

For the aforementioned reasons, this Court should sentence Mr. Webber to time served with three years of supervised release to follow, along with the required special assessments and no fine. For the purpose of general deterrence, this Court should include in the judgment a finding that the time served to date in this case is the equivalent of a 42 month sentence, factoring in statutory good time and BOP pre-release policies to halfway houses. This case simply does not warrant a eleven or twelve year sentence, given all the relevant factors including the loss amount, Mr. Webber's conduct, the complicit nature of the participants other than the United States, and the nature of the crime.

Respectfully submitted,

May 17, 2017
Dated

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/S

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